Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Request for Review by Cingular Wireless LLC of Decisions of the Universal Service Administrator	)	CC Docket No. 96-45
	)	CC Docket No. 97-21
	)	
New Cingular Wireless Services, Inc. Filer IDs: 805769 and 804480	)	
	)	

To: The Chief, Wireline Competition Bureau

**REPLY COMMENTS OF CTIA - THE WIRELESS ASSOCIATION®
TO REQUEST FOR REVIEW OF USAC DECISIONS
REGARDING USE OF THE WIRELESS SAFE HARBOR**

Pursuant to Sections 54.720(f) and 1.45(c) of the Commission's Rules, CTIA – The Wireless Association® ("CTIA") files these reply comments in response to the above-captioned Request for Review of Cingular Wireless LLC challenging USAC's application of the wireless safe harbor to "toll services" revenues reported on FCC Form 499-A.[1] Although the instant case concerns a single carrier, the issue is relevant to virtually all CMRS carriers. The inappropriately narrow application of the wireless safe harbor has concerned CTIA and its members for at least two years,[2] and CTIA urges the Commission to grant Cingular's request and, in doing so, clarify without further delay that wireless carriers may apply the safe harbor (or a company-specific

[1] Request for Review by Cingular Wireless LLC of Decisions of the Universal Service Administrator; New Cingular Wireless Services, Inc., Filer IDs 805769 and 804480, CC Docket Nos. 96-45 and 97-21 (filed Mar. 31, 2006) (the "Cingular Request for Review").

[2] *See* CTIA ex parte letter, CC Docket No. 96-45 (filed May 19, 2004); CTIA ex parte letter, CC Docket No. 96-45 (filed July 14, 2004) (these ex parte letters are **attached** to this pleading).

factor) to allocate *all* mobile telephony revenues, including "toll" revenues,[3] for universal service reporting purposes.

I. THE COMMISSION RIGHTLY INTENDED THE SAFE HARBOR TO APPLY TO ALL WIRELESS TELEPHONY TRAFFIC

The Commission's safe harbor was adopted in recognition of wireless carriers' inability, "without substantial difficulty, [to] identify their revenues as interstate or intrastate".[4] This inability arises because CMRS carriers "operate without regard to state boundaries in that their service areas, and areas served by a particular antenna, do not correspond to state boundaries."[5] Thus, calls originated from handsets in a border area of one state may be picked up by a cell site in an adjacent state.[6] Further, because CMRS carriers "often use a single switch to serve areas located in more than one state, calls originating and terminating in one state may be transported to a switch in another state."[7]

CMRS carriers' inability to ascertain the jurisdictional nature of traffic applies with equal force to *all* traffic, not just traffic reported in the Mobile Services category on Forms 499-A and 499-Q. The fact that a carrier has billed separately for particular calls in no way means that it is

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[3] As Cingular persuasively argues, the concept of "toll" revenues is an artifact of wireline billing structures and generally inappropriate in the CMRS context. Cingular Request for Review at 19-22. Given the current requirements, however, CTIA assumes for purposes of these comments that at least some CMRS carriers have some revenues that are properly classified as "toll" on the revenue reporting form – although as shown herein such classification does not preclude the application of the wireless safe harbor to those "toll" revenues.

[4] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21255 (1998) *("Safe Harbor Order"* or *"Safe Harbor First FNPRM"*, as applicable*).*

[5] *Id.*

[6] *Id.* For example, many CMRS carriers serve the Washington, D.C., neighborhood of Georgetown from cell sites located on tall office towers across the Potomac River in Rosslyn, Virginia.

[7] *Id.*

any easier to determine whether the calls are inter- or intrastate. The problems cited in the *Safe Harbor Order* (quoted in the prior paragraph) arise with wireless "toll" calls as well as with wireless "local" calls – there is no telling whether an originating or terminating handset is in the same state as the cell site with which it is communicating or as the switch carrying the traffic.[8] Moreover, because wireless handsets are mobile, originating or terminating telephone numbers reveal nothing about the beginning and end points of a call – two wireless subscribers with local numbers from Maine and Oregon, respectively, may call one another from different rooms in the same hotel in Texas.

For this reason, in adopting the safe harbor, the Commission stated that it would not seek supporting data from CMRS providers if they report at least the safe harbor percentage "of their cellular and broadband PCS telecommunications revenues as interstate."[9] The Commission did not qualify the availability of the safe harbor and, indeed, it would have been antithetical to the purpose of the safe harbor for it to have done so.[10] When it addressed the wireless safe harbor again in 2002, the Commission did not suggest any limitation on its application, simply stating that "wireless providers availing themselves of the revised interim safe harbor will be required to report 28.5 percent *of their telecommunications revenues* as interstate beginning with fourth quarter 2002 revenues reported on the February 1, 2003, FCC Form 499-Q."[11]

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[8] Cingular states that the traffic at issue in its cases "relates to calls from customers with service plans providing that long distance service would be billed in at least some instances on a per-call basis." Cingular Request for Review at 13.

[9] *Safe Harbor Order*, 13 FCC Rcd at 21259.

[10] *See id.* at 21255-59.

[11] *Federal-State Joint Board on Universal Service, et al.*, CC Docket Nos. 96-45 et al., Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24966 (2002) *("Safe Harbor Modification Order")* (emphasis supplied).

Thus, the Commission consistently has held that wireless carriers may use the safe harbor to allocate *all* their end-user telecommunications revenues. There simply is no basis to preclude wireless carriers from using the safe harbor to determine the jurisdictional character of calls billed as "toll."

II. UNDER CURRENT RULES, RESTRICTING USE OF THE SAFE HARBOR FOR CMRS CARRIERS' TOLL REVENUES WOULD BE UNLAWFUL

As demonstrated in section I, above, the Commission has never proposed to preclude wireless carriers from using the safe harbor for toll revenues, and the Commission's orders have never included such a restriction. Thus, any attempt to restrict CMRS carriers' use of the safe harbor for toll revenues (whether through, e.g., the post-2001 Form 499-A instructions or through USAC's audit decisions in Cingular's and similar cases) would be unlawful.

As the Commission is well aware, the Administrative Procedure Act ("APA") requires the Commission to provide substantive notice and an opportunity for public comment before new rules are adopted and applied.[12] The Commission has never provided notice that it intended to preclude wireless carriers from using the safe harbor to determine the jurisdictional classification of their toll revenues. The only time the safe harbor has been substantively modified was in 2002, and at that time the only active issue specific to the CMRS safe harbor was its overall level.[13] As a result, the Commission never has provided notice that it intended to restrict use of

[12] *See* 5 U.S.C. §§ 553(b)-(c).

[13] *See generally Safe Harbor First FNPRM*, 13 FCC Rcd at 21262-66; *Safe Harbor Modification Order*, 17 FCC Rcd at 24954-57. Other active issues, not directly relevant to the safe harbor, included whether the Commission should continue to use a revenues-based contribution methodology and how carriers should be allowed to recover their contributions from customers.

the safe harbor for purposes of CMRS carriers' toll revenues. Because the Commission has never provided notice of such a restriction, it cannot impose one consistent with the APA.

It appears that this restriction on the CMRS safe harbor, as USAC has applied to Cingular, first appeared in the instructions to the revised Form 499-Q that was published as Appendix C to the *Safe Harbor Modification Order* in late 2002.[14] In that iteration of the Form, the language first appeared in the instruction stating in relevant part that the CMRS "safe harbor percentages may not be applied to … toll services charges."[15] There was no discussion of such a restriction in the text of the order, however, and as noted above no prior notice was given that such a restriction was under consideration. As a result, no such restriction could have been adopted under APA requirements.

Although the Wireline Competition Bureau (the "Bureau") has delegated authority to modify the Form 499, that authority extends only to "administrative aspects of the reporting requirements, not to the substance of the underlying programs."[16] CMRS carriers' ability to use the safe harbor to allocate their toll revenue is unequivocally a substantive requirement – it affects CMRS carriers' financial contribution obligation as to their toll revenues. Furthermore, the Bureau's delegated authority to make changes to Form 499 extends only to making changes that are consistent, not inconsistent, with decisions of the full Commission. Precluding application of the safe harbor to toll service charges clearly is not consistent with the very premise underlying adoption of the safe harbor – that mobile wireless carriers face difficulties in

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[14] *Safe Harbor Modification Order,* App. C, 17 FCC Rcd at 25038.

[15] *Id.*

[16] *1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms,* Report and Order, 14 FCC Rcd 16602, 16620-21 n.93 (1999) *("Consolidated Reporting Order").*

identifying jurisdictional originating and terminating points of a particular call. Thus, there can be no argument that the restriction could have been imposed by the Bureau pursuant to its delegated authority.

Similarly, USAC has delegated authority to administer universal service contributions, but has no authority to make universal service policy or even interpret unclear provisions of the rules or statute.[17] USAC is therefore powerless to impose a restriction on CMRS carriers' use of the safe harbor for toll revenues absent a clear Commission-level modification of the *Safe Harbor Order* establishing such a requirement. As discussed above, no such requirement ever has been promulgated. It is therefore unlawful for USAC to prohibit a CMRS carrier, such as Cingular, from applying the safe harbor to toll revenues.

[17] 47 C.F.R. § 54.702.

CONCLUSION

Because wireless carriers – like the spectrum-based services they provide – operate without regard to state boundaries, it is virtually impossible for wireless carriers to determine whether a given call is intra- or interstate. This is true whether the call is billed as part of the customer's regular rate plan or is billed as "toll." In view of this problem, the Commission wisely adopted the CMRS safe harbor, and has never indicated that it intended to restrict use of the safe harbor for toll revenue. Given that the Commission has never spoken to this issue, it would be unlawful for the Bureau or USAC to apply such a restriction to a CMRS carrier, as it is being applied to Cingular in the instant case. CTIA urges the Commission to reverse USAC's determinations in the Cingular case, and to clarify that CMRS carriers may apply the safe harbor to determine the jurisdictional treatment of all their mobile telecommunications service revenues, including toll revenues.

Respectfully submitted,

CTIA – THE WIRELESS ASSOCIATION®

By: /s/_____
Paul W. Garnett
Assistant Vice President
Regulatory Affairs

Michael F. Altschul
Senior Vice President and General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

April 17, 2006

ATTACHMENTS:
CTIA EX PARTE LETTERS DATED
MAY 19, 2004
JULY 14, 2004

May 19, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
12th Street Lobby, TW-A325
Washington, DC 20554

Re: *Ex Parte Presentation*
CC Docket No. 96-45

Dear Ms. Dortch:

On May 18, 2004, Paul Garnett, Director, Regulatory Policy and Christopher Day, Staff Counsel, CTIA – The Wireless Association™; Glenn Rabin, ALLTEL Communications, Inc.; Ben Almond, Cingular Wireless; and Peter Connolly, Holland & Knight, LLP, representing U.S. Cellular, met with Eric Einhorn, Chief, Telecommunications Access Policy Division, Wireline Competition Bureau; Anita Cheng, Assistant Chief, Telecommunications Access Policy Division, Wireline Competition Bureau; and Vickie Robinson, Legal Advisor, Wireline Competition Bureau Front Office. During the meeting, the parties discussed concerns over recent revisions to FCC Form 499-A and Form 499-Q instructions that prohibit Commercial Mobile Radio Service ("CMRS") providers from applying the interim wireless safe harbor to so-called "toll service charges."

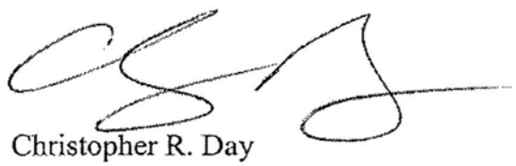
A number of Commission orders acknowledge that CMRS carriers lack the ability to precisely determine the jurisdictional nature of mobile wireless calls. The Commission therefore allows CMRS carriers to use traffic studies to approximate their interstate telecommunications revenues or apply a wireless "safe harbor" to report interstate telecommunications revenues. However, the Form 499-A and Form 499-Q instructions require that CMRS providers report the "actual amount of interstate and international revenues" for so-called "toll service charges," rather than just reporting either the "safe harbor" amount or an amount determined by a traffic study.

CTIA and the other industry participants noted that the modified Form 499-A and Form 499-Q instructions improperly limit the scope of the wireless safe harbor and will result in recovery practices that are unreasonably expensive, administratively burdensome for carriers, extremely confusing for consumers, and inconsistent with direction provided in Commission orders. CTIA also pointed out that "toll service charges" is a fixed wireline concept that does not apply in the mobile wireless context. Accordingly, CTIA urged the Bureau to either clarify that "toll service charges" do not include mobile

wireless revenues or, to the extent that the Bureau believes that mobile wireless revenues include "toll service charges," modify the Form 499-A and Form 499-Q instructions to make clear that the safe harbor may be applied to all mobile wireless revenues, including so-called "toll service charges." CTIA noted that the Bureau has been delegated authority to modify form instructions to make them consistent with Commission orders.

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter, along with all of the materials distributed at the meeting, is being filed via ECFS with your office. Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Christopher R. Day

Attachment

cc: Eric Einhorn
Anita Cheng
Vickie Robinson

CMRS PROVIDERS SHOULD NOT BE FORCED TO REPORT ACTUAL REVENUES FOR "TOLL SERVICE" CHARGES

- Prohibiting CMRS providers from applying the safe harbor to "toll service charge" revenues is inconsistent with Commission orders.
    - Reporting on a disaggregated basis "actual" intrastate, interstate and international revenues is optional for mobile wireless providers (FCC 98-278 ¶¶ 10-15; FCC 02-329 ¶ 24).
    - The Commission has recognized that mobile wireless providers continue to have difficulties identifying interstate telecommunications revenues for all categories of traffic, even when reporting "actual" revenues (FCC 03-20 ¶¶ 7-8). The Commission therefore permits carriers to conduct traffic studies when reporting "actual" interstate telecommunications revenue.
- Commission orders detailing appropriate universal service contribution recovery practices make clear that the safe harbor applies to all carrier telecommunications revenues (FCC 03-20 ¶ 8 nn. 24, 26). Misapplication of the safe harbor, contrary to Commission orders, will result in recovery practices that are unreasonably expensive, administratively burdensome for the carriers, and extremely confusing for customers.
    - Application of the Telecommunications Reporting Worksheet's misinterpretation of the Commission's orders concerning the wireless safe harbor rate would require wireless carriers to compute their pass-through charges as follows: [(Total telecommunications revenues) less (intrastate, interstate and international toll revenues) times (contribution factor) times (safe harbor rate)] plus [(interstate and international toll revenues) times (contribution factor)].
- "Toll Charges" is a fixed wireline concept that does not apply in the mobile wireless context.
    - The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service. 47 U.S.C. § 153(48).
    - The Act's "toll service" definition only refers to wireline networks where the originating and terminating points of a call are more easily ascertained.
        - In contrast, mobile wireless providers generally do not have the ability to determine intrastate, interstate, or international telecommunications revenues on a customer-by-customer or call-by-call basis. FCC 03-23 ¶ 8.

- As applied to mobile wireless providers, "toll charges" is not defined in the Act, Commission rules, or in the form instructions. It therefore may be appropriate for the Worksheet to be amended such that mobile wireless providers would report all their mobile wireless end-user revenues under lines 403, 409, and 410 of the Worksheet.

- The Bureau does not have discretion to substantively change the safe harbor without notice and comment. The Commission's safe harbor was adopted and instituted to avoid the transactional, operational and financial burdens that the recommended application of the Worksheet's instruction would trigger on the wireless industry.

  - The Commission's delegation of authority to the Bureau to modify reporting requirements "extends only to making changes to administrative aspects of reporting requirements, not the substance of the underlying programs." *See* FCC 99-175 ¶¶ 38-39.

July 14, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
12th Street Lobby, TW-A325
Washington, DC 20554

Re: *Ex Parte Presentation*
CC Docket No. 96-45

Dear Ms. Dortch:

On July 13, 2004, Paul Garnett, Director, Regulatory Policy, CTIA – The Wireless Association™; Ben Almond, Vice President, Federal Regulatory, Cingular Wireless; Mark Rubin, Director, Federal Government Relations, Western Wireless; and Peter Connolly, Holland & Knight, LLP, representing U.S. Cellular, met with Carol Mattey, Deputy Chief, Wireline Competition Bureau; Richard Lerner, Associated Chief, Wireline Competition Bureau; Rodger Woock, Chief, Industry Analysis and Technology Division, Wireline Competition Bureau; Cathy Carpino, Deputy Chief, Telecommunications Access Policy Division, Wireline Competition Bureau; and Vickie Robinson, Legal Advisor, Wireline Competition Bureau Front Office. During the meeting, the parties discussed concerns over recent revisions to FCC Form 499-A and Form 499-Q instructions that prohibit Commercial Mobile Radio Service ("CMRS") providers from applying the interim wireless safe harbor to so-called "toll service charges."

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Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter, along with all of the materials distributed at the meeting, is being filed via ECFS with your office. Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Paul W. Garnett

Paul W. Garnett

Attachment

cc: Carol Mattey
Richard Lerner
Rodger Woock
Cathy Carpino
Vickie Robinson

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CERTIFICATE OF SREVICE

I, Debrea M. Terwilliger, hereby certify that on the 17th day of April, 2006, I caused copies of the foregoing REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION® TO REQUEST FOR REVIEW OF USAC DECISIONS REGARDING USE OF THE WIRELESS SAFE HARBOR to be sent to the following by first-class mail:

J. R. Carbonell
Carol L. Tacker
M. Robert Sutherland
Cingular Wirless LLC
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342

Universal Service Administrative Company
2000 L Street, N.W.
Suite 200
Washington, DC 20036

/s/
Debrea M. Terwilliger